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IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

No. 163

THE NATIONAL SMALL SHIPMENTS TRAFFIC CONFERENCE, INC.,
and
DRUG AND TOILET PREPARATION TRAFFIC CONFERENCE,
Appellants,

v.

RINGSBY TRUCK LINES, INC., et al.,
Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLORADO.

APPELLANTS' BRIEF IN OPPOSITION TO MOTION TO DISMISS

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Pursuant to Rule 16 (3) of the Revised Rules of the Court, appellants submit this brief in opposition to the motion filed by the appellees to dismiss the appeal.

Statement

This appeal from the order of a three-judge court which set aside an order of the Interstate Commerce Commission, assigns error to the court below in three areas: (1) neither a threat of irreparable injury nor preservation of status and rights necessitated the restraint on the Commission's order imposed and kept in force by the district court; (2) motions presented by appellees and other parties affecting their substantial rights and legal prerogatives were left undetermined by the district court in disposing of the cause on the merits; (3) Commission authority to set and apply standards of proof in general increase cases was displaced by the district court's evaluation of the evidence measured by standards no longer in effect. In final result, the agency insisted on affirmative evidence sufficient to support findings that the increases were reasonable, while the reviewing court was satisfied to accept less.

To this appeal, the motor carrier appellees have responded with a motion to dismiss, footed on contentions that the appeal was untimely filed; mooted; precluded by a Commission response to the district court's remand. Appellants suggest that none of these conditions are present or operative here. Appellee's motion is lacking in merit and should be denied.

ARGUMENT

I.

The appeal is from a final order of the District Court and was timely made.

Appellees describe this as "a direct appeal from an interlocutory memorandum, opinion, and order of a three-judge District Court." This, of course, assumes as fact the question placed in issue by the motion to dismiss. If the district court's order was interlocutory, section 2101(b) (28 U.S.C.) fixes 30 days for appeal to this Court; if the district court's order was final, the section allows 60 days. *United States* v. *U. S. Smelting,* 339 U. S. 186 (1949), quoted by appellees in support of their position, is manifestly not controlling as decision or persuasive as dictum. The Court in that case had before it, not an order of the district court setting aside and remanding a Commission order after final hearing on the merits, but a temporary injunction granted "in order to maintain the status quo." The Court said (at p. 189):

> The matter was remanded to the Commission "for such action as it may find justifiable in the premises," and the Commission was "temporarily enjoined from requiring its formal order to be carried into force and effect . . ."

At another point the Court stated (p. 199):

> This was an interlocutory order that was appealable because Congress, notwithstanding its interlocutory character, had made it appealable.

The order issued by the district court here was an altogether different sort. It came long after a temporary restraining order had been granted and after a later order (November 4, 1966) continued the restraining order in effect. The order appealed from was issued January 5, 1967 after hearing on the merits. The order itself is the terminal portion of the district court's opinion, captioned "Memorandum Opinion and Order (JS, A-1). It is not denominated as interlocutory, temporary, or interim. The court, after declaring (JS, A-13) that the findings and reasoning of the Commission are insufficient to justify its holding, vacates and sets aside the Commission's order in these terms (JS, A-14):

> It is therefore ordered that the Commission's order . . . be vacated and set aside and that this matter be remanded to the Commission for further proceedings in conformity with this opinion.

These, of course, are the standard terms employed by reviewing courts when, after hearing on the merits, they find agency action not sustainable. The order handed down by the district court, after hearing on the merits, "sets aside, vacates, and remands." There can be little doubt that such an order is final within the meaning of 28 U.S.C. 2101(b), rather than interlocutory. The cases have so held.

The Penn-Central merger case recently before this Court in *Baltimore & Ohio R. Co.* v. *U. S.*, 87 S.Ct. 1100, is now before the district court on remand as *Erie-Lackawanna Railroad Company* v. *United States* (S.D.N.Y., 66 Civ. 2860). In a memorandum order issued July 3, 1967, the three-judge court dealt with

contentions put forth by some parties that the case before the court was terminated now that the Commission had responded to the remand with a supplemental report. These parties argued they were now free to start new actions in other courts of appropriate statutory venue. The court recognized that while this could be true in the case of an order setting aside and remanding after hearing on the merits, it was not so where the court's order was a temporary injunction. Judge Friendly, writing the opinion, stated:

> All that we had before us for decision last fall and the Supreme Court had before it on appeal, see 386 U.S. at 378, were motions for interlocutory relief, to wit, temporary injunctions of the merger . . .

He distinguished *New York Central R.R. Co.* v. *United States,* 200 F. Supp. 944, as dealing with an order and remand that was final. He stated:

> Their reliance on New York Central R.R. v. United States, 200 F. Supp. 944 (S.D.N.Y. 1961) is wholly misplaced. The issue raised by the parties in that case was whether an action brought here should be transferred to the District Court for Maryland under 28 U.S.C. § 1404(a), and we held it could not be . . . that the Maryland District Court had taken final action, Baltimore & Ohio R.R. v. United States, 151 F. Supp. 258 (D. Md.), vacated 355 U.S. 175 (1957), and not merely granted interlocutory relief as has been done here; and, as this court noted, that the Maryland interests recognized this by bringing "an entirely new action" after the

Commission's further order, see 200 F. Supp 946 n.3.

The cases referred to are particularly apposite here. In *Baltimore & Ohio,* the Maryland district court set aside Commission orders prescribing rate parity at three ports. It remanded to the Commission. The Commission responded and issued another order which approved parity at two ports, but not the third, the Port of New York. New actions were started in two different three-judge courts, one in Maryland; the other, in the Southern District of New York. The New York court in *New York Central* denied a motion to transfer the action and retained jurisdiction of the suit. In so doing, the court considered the nature of the order previously made in *Baltimore & Ohio* by the Maryland court in setting aside and remanding. It is to that order that Judge Friendly now refers when he says: "The Maryland District Court had taken final action . . . and not merely granted interlocutory relief . . . the Maryland interests recognized this by bringing an entirely new action after the Commission's further order." The order of the Maryland court was strikingly similar to the order handed down in the instant case. The order of the Maryland court, described by Judge Friendly as "final action" directed that Commission orders it disapproved be vacated and the case remanded to the Commission to make explicit findings with respect to specified subjects. The court's order employed the customary terms, "set aside, vacate, remand." The court's opinion concluded with the statement "the case is remanded to the Commission for further proceedings consistent with this opinion"—language

comparable in every respect with that which concludes the court's opinion here.

Two considerations point compellingly to the district court's order of January 5, 1967 as one which is final, and not interlocutory: (1) the court's order, granted in its entirety, the relief prayed by appellees in their complaint. The wherefore clause of the complaint asked the court for an order "setting aside, vacating and annulling" the Commission's order in Docket No. 34462 stated to become effective September 12, 1966; permanently enjoining the Commission from enforcing "the referred to Decision, Order and Requirements;" and remanding the matter to the Commission for further proceedings consistent with the court's opinion. The order as issued, vacated and set aside the "referred to order" and remanded the matter to the Commission as prayed; (2) when, after accepting the court's remand, the Commission issued a new order (affirming the conclusion reached in its prior report) appellees did not return to the district court in the manner of one seeking to conclude unfinished business, but instituted a new action by filing a new complaint requesting the convocation of a three-judge court. Appellees did not move by petition, supplemental complaint, or other pleading before the same three-judge court which set aside the Commission's order and remanded the case. As in *New York Central Railroad Co.* v. *United States,* supra, appellees filed a new complaint docketed as No. 67-97. They did not ask in the complaint that the cause be submitted to the court convoked in the action docketed as No. 66-C-467. The Chief Judge of the Court of Appeals responded to the new complaint

with a new order designating a three-judge court, similarly constituted as to personnel, but otherwise disassociated from the prior court. It is not without significance that appellants, parties in Case No. 66-C-467, were not served with copies of the complaint filed by appellees in Case No. 67-97.

Appellees' contentions that the court's order must be considered interlocutory is at variance with the understanding and the practice of bench and bar. See *Saskatchewan Minerals* v. *United States*, 253 F. Supp. 504; 385 U.S. 94 where notice of appeal was filed in the 60-day period provided by Section 2101(b) for appeal from final orders of district court. See also *Judicial Review of Orders of the Interstate Commerce Commission*, 11 Vanderbilt Law Review 1143 at 1147.

II.

Issues raised by the appeal have not been rendered moot.

Appellees declare (Motion p. 7) that questions raised concerning the temporary restraining order and matters related thereto are moot as the restraining order is no longer in effect. Appellants maintain (JS 9-17) that the restraining order granted September 9, 1966 and continued in force to January 5, 1967 when the three-judge court handed down its decision on the merits, was in contravention of statutory provisions which make irreparable injury the indispensable condition to exercise of the extraordinary remedy of interlocutory restraint and which, in any case, stipulate that application for an interlocutory injunction

"shall be given precedence and assigned for hearing at the earliest practicable date" 28 U.S.C. 2284 (3); 2284(4). The court below failed to rule on appellees' application for interlocutory injunction or on any of the motions presented by appellants (JS, 14-16). On November 4, 1966, when the matter came on for hearing with respect to the motions, the application for interlocutory injunction, and the merits, the court announced that it is "unable at this time to make a determination of the application for interlocutory injunction". It was silent as to the motions (See Order of November 4, 1966, Appendix).* The court in fact never issued a decision on any of the motions or on the application for interlocutory injunction. Appellants' first intimation that it did not intend to do so came on January 5, 1967 when it handed down its memorandum opinion and order on the merits. If applicants are to have any opportunity at all to raise the question of the propriety of the court's action, it is only by means of this appeal that they can do so.

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* Appellees aver (Motion p. 6) that the order of November 4, 1966 "was dispositive of all the motions made by the appellants." That this was neither the tenor, nor the result, of that order is evident from a reading of the appended copy. The motions were for an indemnity bond; for an order to protect shippers from irreparable financial loss should the Commission's order be found to have been wrongfully restrained; for an order to limit the restraint on the Commission's order to those 15 carriers who were plaintiffs in the action so as to leave unaffected the remaining 1400 tariff participants who neither sought review nor restraint of the Commission's order. These motions were presented to the court in the context of appellees' application for an interlocutory injunction with the purpose of obtaining counter-vailing relief should the court be minded to grant an interlocutory injunction. The November 4th order explicitly states that the court is unable to make a determination at this time on the application for interlocutory injunction. Although it referred to the motions as matters before it, it said nothing about rulings thereon. It is difficult to accept the claim of appellees that the motions were nevertheless disposed of *sub silentio* by the order.

For appellees to assert that "all such questions are moot. The restraining order is no longer in effect" is to deny appellants the means of reviewing the district court's actions.

That this is no mere exercise in juridical theory is clear from the fact that shippers and receivers of freight who are represented in this action by the appellants, have been subjected to heavy financial loss by unwarranted restraint of the Commission's order (JS 17). The law provides remedial procedures for the protection of shippers in such circumstances. In *Arkadelphia Milling Co.* v. *St. Louis S. W. R. Co.*, 249 U. S. 134 (1919) this court described the remedy of restitution. See also *Public Service Commission* v. *Brashear Freight Lines*, 41 F. Supp. 952 (1941); 312 U. S. 621 (1941). The subject is comprehensively explored in 73 Harvard Law Review 333 in a note titled *Interlocutory Injunctions and the Injunction Bond—Recovery for Erroneous Injunctions.*

Unwarranted restraint on a Commission order, requiring cancellation of rate increase schedules, has inflicted financial injury of extraordinary dimensions on shippers by motor carrier in the vast transcontinental territory. Their right to restitution accrued from the moment restraint was placed on the Commission's order. Access to the remedy of restitution awaits determination of issues raised by this appeal. The issues are not moot but viable. They merit adjudication by this court.

III.

This appeal is not precluded by Commission response to the remand.

If, as appellants believe, the district court erred in setting aside the Commission's order, a right accrued to the parties aggrieved to prosecute the appeal and to enforce restitutional remedies looking to restoration of financial loss sustained by improvident restraint of the Commission's order. That right and access to such a remedy is not barred by the Commission's response to the remand. Indeed, it is fortified by the nature of the Commission's supplemental report and order which reaffirmed the prior ruling holding the carriers' rate increases not shown reasonable and directed cancellation of the offending schedules. That the Commission's order left open the door for further review by "that or another court" has no bearing on appellants' right to prosecute this appeal.

Appellees by their motion do not challenge or contest the position set forth in the Jurisdictional Statement (JS 9; 20) that questions raised by the appeal are substantial in probing the fundamental relation of administrative agency and reviewing court as they interact in general increase proceedings, with special reference to standards of proof and the power of the agency to formulate and apply them. These issues inhere in the action taken by the district court with respect to the Commission's original order. Such issues survive anything the court may do in the second case brought before it. If for no other reason

than to introduce needed clarity and precision in the developing law of motor carrier regulation, appellants respectfully suggest, the appeal merits acceptance by this Court. Just such a view was expressed in *Eastern Airlines, Inc.* v. *Civil Aeronautics Board,* 345 F. 2d 488, (U.S.C.A. D.C., 1950). Eastern Airlines was permitted to intervene and file a petition to review an exemption order granted by the Board to Capital Airlines. The court refused to reject the appeal as moot saying:

> "Since the exemption order, and its successor, have expired by their own terms, we might dismiss the petition for review as moot. But judicial decision of important questions that are likely to recur should not be 'defeated, by short-term orders, capable of repetition, yet evading review'."

This Court in *Southern Pacific Terminal Co.* v. *Interstate Commerce Commission,* 219 U.S. 498 (1911), declined to hold a case moot where the Commission order challenged had expired by its own terms. The court said that the order under attack "may to some extent . . . be the basis for further proceedings," that questions involved in reviewing orders of the Commission are "usually continuing" and that review of the order ought not to be precluded by allegations of mootness. In *United States* v. *Trans-Missouri Freight,* 166 U. S. 290, an agreement challenged as unlawful was dissolved prior to trial. The Court nevertheless held the case not moot, as rights of other parties had not been extinguished, but still remained for the Court's determination. In *Bebchick* v. *Public Utilities Commission,* 318 F. 2d 187 (D.C. Cir. 1963)

a Commission order under attack had been superseded. It was urged that the case was rendered moot. The Court rejected the contention and said (189-190):

> We consider first Transit's suggestion that the case is moot due to supersession of the order of March 2, 1960, by the Commission's order No. 4735 of January 18, 1961. The latter order, however, continues in effect a cash fare of 25 cents. A rate order such as the one before us is not mooted by another which has the effect of keeping the controversy alive. [citing Southern Pacific Terminal, supra and Eastern Airlines, supra] Moreover, the validity of the order of March 2, 1960, during the time it was in effect before it was superseded, remains in controversy; for the disposition of any excess funds which might have accumulated prior to January 18, 1961, by reason of the invalidity of the increase, remains for decision. So we hold that the case is not moot.

Conclusion

As suggested in the Jurisdictional Statement the questions presented on this appeal are substantial. They involve fundamental rights of shipper and carrier when Commission orders are sought to be restrained. Pressing issues in this sphere have not previously reached the Supreme Court. The action of the court below is in conflict with decisions of other district courts. Such conflicts urgently call for resolution in the context of the present formative period

in motor carrier rate making. Appellants respectfully suggest that the motion to dismiss should be denied.

Respectfully submitted,

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Dated, New York July 13, 1967.

APPENDIX

Order

THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF COLORADO

Civil Action No. 66–C–467

RINGSBY TRUCK LINES, INC., et al.

Plaintiffs,

vs.

UNITED STATES OF AMERICA and
INTERSTATE COMMERCE COMMISSION,

Defendants.

PORTLAND FREIGHT TRAFFIC ASSOCIATION, WEST COAST TRAFFIC COMMITTEE of the TOY MANUFACTURERS ASSOCIATION, NATIONAL SMALL SHIPMENTS TRAFFIC CONFERENCE, INC., and DRUG AND TOILET PREPARATION TRAFFIC CONFERENCE,

Intervening Defendants.

This matter came on for hearing today on an application for interlocutory injunction and objections thereto, trial on the merits and various motions. The temporary restraining order heretofore granted is effective until the hearing on the application for interlocutory injunction. The Court is unable at this time

to make a determination on the application for interlocutory injunction or on the merits.

Accordingly, it is Ordered that the temporary restraining order shall be and remain in effect in accordance with all the terms and provisions thereof until the determination of the application for interlocutory injunction by this Court.

Dated at Denver, Colorado, this 4th day of November, 1966.

By the Court:

JEAN S. BREITENSTEIN
United States Circuit Judge

ALFRED A. ARRAJ
United States District Judge

HATFIELD CHILSON
United States District Judge